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U.S. Appeals Post Case to High Bench

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The government, after losing for a second time in the U.S. Court of Appeals here, went to the Supreme Court last night in an effort to prevent The Washington Post from publishing a series of articles based on secret Pentagon documents.

Unless the Supreme Court grants a further restriction against The Post, the government argued, "not only will this case become moot but, even more seriously, the damage to the national security and the conduct of our foreign relations that the government is seeking to prevent by this action will irrevocably be placed beyond repair."

"This case and the one involving The New York Times present constitutional issues of great magnitude," Solicitor General Erwin N. Griswold said in his petition to the high court.

He urged that the Supreme Court modify a ruling of the U.S. Court of Appeals here to place it in conformity with the Second U.S. Circuit Court of Appeals in the New York Times case.

While The Times may not publish certain parts of the Pentagon study on the origins of the Vietnam war pending a further lower court hearing in New York, The Post will be free to publish after a restraining order runs out at 6 p.m. today unless the Supreme Court acts.

The government said it was appealing for action by the Supreme Court in the Post case before the 6 p.m. deadline to "provide equal treatment" between the two newspapers.

Its petition reached the Supreme Court last night hours after most of the justices, who already had received The Times' petition, had gone home for the day.

Only a few hours earlier, the appellate court here turned back the government's case against The Post for the second time in two days, saying the Justice Department had already had an "appropriate opportunity" to show how the articles might endanger national security but failed to meet "its heavy burden of proof."

Seven of the nine judges on the U. S. Court of Appeals for the District of Columbia, in an opinion signed only "by the court," said that "the increasing disclosures increase our concern . . . whether effective relief of the kind sought by the government can be provided by the judiciary."

They noted that since the government originally moved against The Post, The New York Times and The Boston Globe in court, the Los Angeles Times and the Knight newspaper chain had also published reports based on the study.

The stiffly worded opinion, refusing the government's request for another full hearing before all nine appellate judges, said, "We conclude that we are fully appraised of all material considerations and that the matter is now ripe for presentation to the Supreme Court."

Once again, two members of the court, Judges George E.

MacKinnon and Malcolm R. Wilkey, dissented from the majority.

They reasserted their position, originally expressed Wednesday, that the Post case should be sent back to U.S. District Court Judge Gerhard A. Gesell for new considerations of whether certain documents in the Pentagon study could, if published, "result in great harm to the nation."

Gesell, after a day-long hearing Monday — much of it held in secret at the government's request — found that such harm would not result and that the government had offered no basis for prior restraint of publication.

Yesterday's action by the appeals court was triggered at 12:50 p.m. when the government filed a petition for a new hearing at the appellate level on the merits of the Post case and a modification of the appellate decision here Wednesday to conform with one handed down in New York.

In the New York case, involving the New York Times series, the Second U.S. Circuit Court of Appeals ordered a lower court judge there to hold another hearing on whether certain documents, to be specified by the government, pose "grave and immediate danger" to national security.

Raising the issue of "equality of treatment" among various newspapers for the first time, the Justice Department said it would be "unfair to The New York Times" if the ruling in the Washington Post case is permitted to stand.

"The New York Times will be under a restraint which is not applicable to The Washington Post," the government argued, unless the appellate decision in Washington is modified to mirror that in New York.

The Justice Department petition also said that a delay would permit clarification of "uncertainty" about what items in the Pentagon study are covered by an agreement between the government and The Post during the original appeals court hearing here on Tuesday.

Attorneys for The Post, in a memorandum filed with the appeals court at mid-afternoon, said, "we strenuously oppose this effort at still fur-

ther delay. The Constitution simply does not permit a prior restraint based on consideration of 'fairness' to another litigant."

The spread of articles based on the Pentagon study into new newspapers throughout the country, The Post argued, lent "futility" to the government's efforts for an injunction.

"The government, which has been reviewing the documents since 1969, has had almost two weeks to come up with one instance of substantial peril to the national security derived from the 47-volume study, entitled 'History of U.S. Decision-Making Process on Vietnam Policy,' The Post said.

"They have failed to do so," The Post continued. "Indeed, in this case, the government offered in the trial court only one document derived from the series which the trial judge (Gesell) himself quickly riddled. The government has been afforded every opportunity to prove its case, and it has failed."

Eight judges on the appeals court met in private session for over two hours to consider the government request. They also consulted Judge Wilkey, who was in Louisville, by telephone.

The appeals court never summoned the lawyers for either side before them yesterday, affirming their earlier decision on the basis of the legal papers that had been submitted.

"Having the greatest respect for the Solicitor General," they said, "we have given his petition careful consideration but conclude that it should be denied."

The seven judges in the majority said that it was not necessary to examine the Pentagon documents themselves to determine whether danger was posed to national security.

The Post, like The New York Times and The Boston Globe, has refused to turn over the documents in its possession for inspection by the courts, on the grounds that confidential sources might be revealed.

Judge Gesell, and in its turn

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